Silverman's Men's Wear, Inc. *and* General Warehousemen and Employees' Union Local 636 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 6-CA-13326

August 6, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On August 4, 1980, the Board issued a Decision and Order in this case,[1] finding that Respondent had violated Section 8(a)(5) and (1) of the Act, as amended, by refusing to bargain collectively with the Union. On August 6, and as amended on August 17, 1981, the United States Court of Appeals for the Third Circuit denied enforcement of the Board's Order and remanded the case for a hearing on Employer's Objection 2 in Case 6-RC-8448.[2] On October 28, 1981, pursuant to the court's order, the Board issued an Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing. On January 28, 1982, following a hearing, Administrative Law Judge Jerry B. Stone issued his Decision in this proceeding, finding that the Union had not engaged in the objectionable conduct alleged in Employer's Objection 2 and recommending that the Board's Order in this proceeding be reiterated, that the prior certification be continued in effect, and that Objection 2 be overruled. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

[1] 250 NLRB 1388.

[2] No. 80-2574 (1980).

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent has excepted to the Administrative Law Judge's refusal to allow testimony to demonstrate post-election changes in the bargaining unit. The Administrative Law Judge sustained the General Counsel's objections to such testimony on the ground that any issue of change in the bargaining unit was beyond the scope of the hearing. We agree. It is well established, furthermore, that, absent special circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of the certification. As Respondent's refusal to bargain occurred during the certification year, this presumption is clearly applicable. Moreover, even if Respondent's refusal to bargain had not occurred during the certification year, the Board has long held that the factor of employee turnover does not establish that the Union has lost its majority status. Accordingly, we find no merit in Respondent's contention.

We also find no merit in Respondent's contention that it was denied due process by the Administrative Law Judge's ruling that Respondent might not cross-examine Baird about organizing campaigns other than the one involved in this proceeding. Respondent's opportunity to test Baird's memory was ample in the context of the issues directly involved in the instant proceeding. We find that the Administrative Law Judge did not abuse his discretion by preventing Respondent from introducing collateral issues into this proceeding.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board affirms its Order as contained in its original Decision and Order issued August 4, 1980, in this proceeding.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: The petition in Case 6-RC-8448 was filed on March 30, 1979. Thereafter, on May 31, 1979, an election was held pursuant to a Stipulation for Certification Upon Consent Election at Respondent's distribution warehouse in Warrendale, Pennsylvania. The Petitioner, General Warehousemen and Employees' Union Local 636 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, won 29 to 23. Respondent filed objections to the election, including an objection that the Union's secretary-treasurer, Robert Baird, had infected the election atmosphere with religious prejudice by his remarks at a union meeting concerning Respondent's vice president, Mark Silverman. Without an objections hearing, the Regional Director recommended that the Board overrule the objections and issue a certification of the Union as the collective-bargaining representative of the employees involved. The Board adopted the recommendation. After certification, the Union demanded that Respondent bargain collectively pursuant to Section 8(d) of the Act. Respondent refused to bargain.

On April 3, 1980, the Charging Party (the Petitioner in Case 6-RC-8448) filed an 8(a)(5) and (1) unfair labor practice charge. On April 23, 1980, the Regional Director for Region 6 issued on behalf of the National Labor Relations Board an unfair labor practice complaint in Case 6-CA-13326. Such complaint alleged in effect that Respondent had refused to bargain with the Union (the Charging Party in Case 6-CA-13326 and the Petitioner in Case 6-RC-8448). Thereafter, on August 4, 1980, the National Labor Relations Board, in a decision reported at 250 NLRB 1388, granted a motion for summary judgment, found that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and issued a remedial order requiring Respondent to bargain with the Union upon request.

Thereafter, on August 6 and 17, 1981, the U.S. Court of Appeals for the Third Circuit refused to enforce the Board's Order in Case 6-CA-13326 as referred to above and remanded the proceeding to the Board for hearing on the Employer's Objection 2 in Case 6-RC-8448.[1]

On October 28, 1981, the National Labor Relations Board remanded Case 6-CA-13326 to the Regional Director for Region 6 of the National Labor Relations Board for the setting of a hearing on Objection 2 in Case 6-RC-8448. On November 5, 1981, the Regional Director for Region 6 of the National Labor Relations Board duly set this proceeding for hearing on November 23, 1981.

The issues as set for hearing were limited to a determination of the merits of the allegations presented in the Employer's Objection 2 in Case 6-RC-8448.

On November 23, 1981, all parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by Respondent and by the Charging Party and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

FINDINGS OF FACT[2]

THE OBJECTIONS ISSUE

Objection 2

The Employer's Objection 2 is as follows:

> At the same meeting called by the Union, the union representative, Mr. Robert Baird, while leading and conducting the meeting, resorted to inflammatory propaganda on matters which in no way related to the choice before the voters. The petitioner interjected irrelevant racial and religious appeals at the meeting attended by this large group of eligible employees.
>
> His action was a deliberate attempt to provoke the employees, through racial and religious remarks which were defamatory toward the Employer, shortly before the election. It was an effort to overstress and exacerbate racial and religious feelings by irrelevant, inflammatory appeal.

The parties presented four witnesses with respect to the issues presented by the Employer's Objection 2. Such witnesses were Tomiann Boots, Amy L. Thorpe, Loretta Manges, and Robert E. Baird. A consideration of the demeanor of the witnesses and the substance of the witnesses' testimony persuade that Robert E. Baird was the only witness presented whose testimony revealed itself to be reliable as to whether Baird engaged in objectionable conduct as alleged. The overall facts reveal that Boots', Thorpe's, and Manges' testimony largely alluded to "impression" and did not reveal in fact what was said at the union meeting on May 25, 1979. In essence, Boots'[3] testimony at the hearing revealed no independent recollection that Baird had, at the union meeting wherein the alleged objectionable conduct had occurred, used the word "Jew" in referring to Mark Silverman. However, Boots, on June 26, 1979, subscribed and swore to an affidavit given to the NLRB containing the following statements:

> I only attended the Friday May 25 union meeting & not the May 30 meeting. I took notes & had a list of questions but I through [sic] them away. Baird had contracts from Penney's, & Gimbels. I do not remember him inviting anyone to look at the contracts. I cannot be sure if someone asked to look at the contracts. He said that because we were being paid so low they were going to lower our initiation fees from $30 to $10. Baird had stated, with regard to employees at Penney's & Gimbels, that they were doing a lot better than we were for the same jobs. He did quote hourly wage figures but I do not recall what they were. I do not recall him quoting any benefits. I asked him aren't we only going to get what the company wants to give us & he said no it depends on how long you people want to hold out for. I remember somebody asking about whether we will be making enough money to pay the dues but I do not remember specifically what he answered. I remember Baird saying the word "Jew." I am sure that he was referring to the Silvermans but I do not remember the context of the statement or what the rest of the phrase was. I got the impression, however, that the comment was derogatory. He also said that we were lower paid than people on welfare. (With regard to this statement I do not know if he was referring to their actual payments or their payments plus benefits.)

Amy L. Thorpe, another witness presented by the Employer, attended the May 25, 1979, union meeting. Thorpe testified that Baird did not use the word "Jew." Thorpe testified, however, that Baird stated that a union was needed because "we work for those kind of people." Thorpe also testified to the effect that such remark to the effect that "we work for those kind of people" occurred around the time that Baird was comparing Silverman's with J. C. Penney's, Hornes, and Gimbels. Exactly who raised the question of whether the word "Jew" or "Jewish" was used by Baird on May 25, 1979, is not revealed. In any event Thorpe and several other employees later discussed the question of whether such words were used and decided that they were not used. Thorpe in her affidavit to the National Labor Relations Board set forth that "I never heard any union representative refer to the Silvermans as stingy Jews and I never heard them say anything about their religious or ethnic background."

Loretta Manges was the only witness presented by the Employer who supports a contention that the word

[1] Set out later herein in full detail.

[2] The findings of fact and conclusions of law relating to the Employer's business operations and commerce and to the status of the Union as a labor organization, as set forth in the Board's decision in *Silverman's Men's Wear, Inc.*, 250 NLRB 1388 (1980), are incorporated herein by reference.

[3] At the time of the events in 1979, Boots was unmarried and known as Tomiann Van Dyke.

"Jew" or "Jewish" was used by Baird on May 25, 1979. Manges testified that such words were used, one or the other. Manges, however, did not know the context in which such word ("Jew" or "Jewish") was used. Manges' pretrial affidavit, dated June 1979, does not reveal that such words—"Jew" or "Jewish"—were used. Rather, Manges' pretrial affidavit set forth as follows—"At no time during the May 25 or May 30 meeting did Baird or any other union representative call Silverman any name or refer to his religious or ethnic background." On cross-examination, Manges' explanation was not persuasive as to the inconsistency between her affidavit given to the NLRB in 1979, and a statement given to the Employer's attorney in 1981 and her testimony in this proceeding.

The sum of Boots', Thorpe's, and Manges' testimony, when considered without the testimony of Baird, reveals itself in composite effect to be unreliable to establish that Baird had made racial or religious slurs about the Silvermans. Rather, Thorpe's, Boots', and Manges' testimony is revealed to be based upon impression. Considering the testimony concerning comparing the Employer's benefits and wages with welfare benefits, such impression could simply be a conclusionary deduction by Thorpe, Boots, and Manges from such comparisons.[4]

Finally, Baird, who impressed me as a thoroughly honest, frank, and forthright witness, testified in detail as to what he told employees at the May 25, 1979, union meeting. Baird emphatically denied that he used any words or statement concerning the Silverman's race, religion, or anything having to do with ethnic background. I found Baird to be a completely credible, objective, and reliable witness. I credit his testimony in denial that he made racial or religious slurs concerning the Silvermans at a union meeting on May 25, 1979.

[4] I note that Manges testified that the word "Jew" or "Jewish" was used. Manges' testimony otherwise was not persuasive that such recollection was reliable.

Conclusion

Based upon the foregoing, it is concluded and found that the Union has not engaged in objectionable conduct as alleged in Employer's Objection 2. It will be recommended that Employer's Objection 2 (Case 6-RC-8448) be overruled.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Conclusions of Law set forth by the Board in *Silverman's Men's Wear, Inc.*, reported at 250 NLRB 1388, are hereby incorporated by reference and reiterated.

2. The Union (General Warehousemen and Employees' Union Local 636 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) has not engaged in objectionable conduct (as alleged in Objection 2 by the Employer in Case 6-RC-8448) and has not thereby engaged in conduct which interfered with the conduct of the election, or the employees' exercise of a free and untrammeled voting right in such election, held in Case 6-RC-8448 on May 31, 1979.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Sections 10(c) and 9(a) of the Act, I hereby issue the following recommended:

ORDER[5]

1. The Board's Order as set forth in *Silverman's Men's Wear, Inc.*, reported at 250 NLRB 1388, is hereby reiterated.

2. The prior certification in Case 6-RC-8448 is continued in effect.

3. The Employer's Objection 2 in Case 6-RC-8448 is overruled.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.